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VIA HAND DELIVERY
June 22, 2000

The Honorable Michael K. Powell
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WT Docket No. 99-217 and CC Docket No. 96-98

Dear Commissioner Powell:

During the course of our meeting on Thursday, June 1st, you inquired as to whether nondiscriminatory access rules could be adopted in the *Competitive Networks* rulemaking that are consistent with the Commission's takings analysis in the *Over the Air Reception Devices* proceeding. As explained below, the distinctions made by the *OTARD Second Report and Order*[1] between a Commission action resulting in application of a *per se* taking analysis and one necessitating the application of a regulatory takings analysis is highly relevant to and consistent with the analysis demanded by a decision in the *Competitive Networks* rulemaking. Moreover, the restrictions that the *OTARD Second Report and Order* viewed as arising from the D.C. Circuit's *Bell Atlantic* decision have since been reinterpreted by that court in a manner that could change the Commission's substantive conclusions in the *Competitive Networks* rulemaking.

In the *OTARD Second Report and Order*, the Commission explained that:

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1 Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services, CS Docket No. 96-83, *Second Report and Order*, 13 FCC Rcd 23874 (1998)("*OTARD Second Report and Order*").

> the right to assert a *per se* taking is easily lost: once a property owner voluntarily consents to the physical occupation of its property by a third party, any government regulation affecting the terms and conditions of that occupation is no longer subject to the bright-line *per se* test, but must be analyzed under the multi-factor inquiry reserved for nonpossessory government activity. . . . once a property owner voluntarily consents to the occupation of its property it can no longer claim a *per se* taking if government action merely affects the terms and conditions of that occupation. . . . . [T]he government has broad power to regulate interests in land that interfere with valid federal objectives.[2]

The same can be said of access provided to a telecommunications carrier. Instead of mandating that a property owner open its property to outsiders, a nondiscrimination provision simply states that, should the owner open its property to any outsider, it must also entertain others. Such is the case with the nondiscriminatory access requirement of the type proposed by the Commission in the *Competitive Networks* rulemaking. So viewed, nondiscrimination is but a governmental condition on a property owner's decision to provide one or more carriers access to its property. Even where such a condition would work a permanent physical intrusion, the condition would constitute a taking only if there is not a sufficient nexus to the government's authority to regulate the underlying action.[3] A nondiscrimination condition bears a sufficient nexus to the FCC's authority to regulate property owners' provision of access to telecommunication carriers; the nondiscrimination condition is proportional to the impact of the landowners' actions, that is increasing the cost and decreasing the availability of competitive facilities-based telecommunications services.

If a nondiscrimination access requirement does not work a *per se* taking, the proposed FCC action is likely to be upheld as a permissible regulation of the use of private property under the "ad hoc, factual inquiries" into the factors summarized in *Penn Central*: the character of the government action,

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2 Id. at ¶¶ 21, 22, and 27.

3 See Nollan v. California Coastal Comm'n, 483 U.S. 825, 836-837 (1987); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

the economic impact of that action, and its interference, if any, with investment-backed expectations.[4] This would be consistent with the Commission's analysis in the OTARD Second Report and Order.[5]

However, even if rules requiring the provision of nondiscriminatory access operate as a per se taking, the *Bell Atlantic* decision does not proscribe the Commission's adoption of such rules. In *Bell Atlantic Telephone Co. v. FCC*,[6] the D.C. Circuit held that the Commission lacked authority to promulgate certain physical collocation rules. The court recognized that it would normally accord *Chevron* deference to the Commission's interpretation of its authority, but held that it would not do so in that case because the Commission's interpretation raised substantial constitutional questions regarding executive encroachment on Congress' exclusive powers to appropriate funds. Specifically, the court found that the Commission's orders amounted to a forced access requirement, and thus in all cases "will necessarily constitute a taking" under *Loretto*.[7] To avoid this perceived constitutional difficulty, the court held that the Commission's authority to order physical co-location must either be found in express statutory language or must be a necessary implication from that language, such that "the grant [of authority] itself would be defeated unless [takings] power were implied."[8]

In the *OTARD Second Report and Order*, it was assumed that the *Bell Atlantic* court's use of the avoidance canon would operate to restrict *all* Commission takings: (1) wherever specific statutory authorization was lacking; and (2) where it was not necessary to effect the taking to avoid defeating

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4 See Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

5 See *OTARD Second Report and Order* at ¶¶ 24-29.

6 24 F.3d 1441 (D.C. Cir. 1994).

7 Id. at 1445-46 (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128 n.5 (1985)). In *Bell Atlantic*, the physical collocation rules were mandatory. With two narrow exceptions, ILECs were required to allow physical collocation in all instances. No measure of voluntariness accompanied the rules. By contrast, a nondiscriminatory MTE access requirement retains the option for the MTE owner to exclude all carriers from the MTE equally. In short, the MTE owner can decide whether to submit to the nondiscriminatory MTE access requirement. As a result, the nondiscriminatory MTE access requirement is more akin to a permissive -- rather than a mandatory -- physical collocation requirement.

8 Id. at 1446 (quoting Western Union Tel. Co. v. Pennsylvania R.R., 120 F. 362, 373 (C.C.W.D. Pa. 1903), aff'd, 195 U.S. 540 (1904))(alterations in original).

the FCC's authority. As explained in greater detail below, since the time the Commission adopted the *OTARD Second Report and Order*, the D.C. Circuit has clarified and restricted the use of the avoidance canon.[9] This strongly suggests that the Commission need not have adopted such a restrictive interpretation of the *Bell Atlantic* holding and encourages a more liberal interpretation in future endeavors.

Bell Atlantic does not preclude Commission authority to promulgate the contemplated nondiscriminatory access requirements.[10] First, *Bell Atlantic* itself is limited to agency actions that "will necessarily constitute a taking."[11] This past year, in *National Mining Association v. Babbitt*, the D.C. Circuit cited *Bell Atlantic* and made clear that "the avoidance canon is not applicable when the statute or regulation would effect a taking, if at all, only in certain situations."[12] A nondiscriminatory access requirement would not necessarily constitute a taking at all. The Commission is not

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9 See Nat'l Mining Ass'n v. Babbitt, 172 F.3d 906, 917 (D.C. Cir. 1999)(A mining company asserted the possibility that the government's alteration of a mining company's previously settled contract rights could expose the government to liability for an unlawful taking and claimed that the avoidance canon necessitated narrowly construing agency authority in a manner that would proscribe such action. The court rejected this position explaining that "the avoidance canon is not applicable when the statute or regulation would effect a taking, if at all, only in certain situations.").

10 The regulation of areas controlled by a utility follows from the express authorization of 47 U.S.C. § 224. As to those areas, therefore, the "strict test" of *Bell Atlantic* is satisfied. Because 47 U.S.C. § 224(f)(1) requires a carrier to provide access to ducts, conduits and rights-of-way "owned or controlled" by it, Congress contemplated that the Commission would regulate property that is merely controlled by a carrier and owned by a third party. Thus, even if the proposed regulations based upon § 224 necessarily effect a taking without just compensation to property owners in every case, Congress in § 224 has expressly granted the FCC the power to effect such takings and has concomitantly authorized the expenditures needed to satisfy those owners' claims for just compensation.

11 See Bell Atlantic 24 F.3d at 1445-46 (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128, n.5 (1985)).

12 172 F.3d 906, 917 (D.C. Cir. 1999)(citing Riverside Bayview, 474 U.S. at 127-28; Bell Atlantic, 24 F.3d 1445; Railway Labor Executives Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993)).

contemplating a requirement that property owners open up their property to all telecommunications carriers, but rather only one that mandates nondiscrimination if the property owner chooses to provide any access. The nondiscriminatory access condition, therefore, is quite analogous to the rent control ordinance which the Supreme Court upheld in *Yee v. Escondido*.[13] The reasoning there is particularly instructive:

> Petitioners' final line of argument rests on a footnote in *Loretto*, in which we rejected the contention that "the landlord could avoid the requirements of [the statute forcing her to permit cable to be permanently placed on her property] by ceasing to rent the building to tenants." We found this possibility insufficient to defeat a physical taking claim, because "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Loretto*, 458 U.S. at 439, n.17. Petitioners argue that if they have to leave the mobile home park business in order to avoid the strictures of the Escondido ordinance, their ability to rent their property has in fact been conditioned on such a forfeiture. This argument fails at its base, however, because there has simply been no compelled physical occupation giving rise to a right to compensation that petitioners could have forfeited. Had the city required such an occupation, of course, petitioners would have a right to compensation, and the city might then lack the power to condition petitioners' ability to run mobile home parks on their waiver of this right. *Cf.. Nollan v. California Coastal Comm'n*, 483 U.S. at 837. But because the ordinance does not effect a physical taking in the first place, this footnote in *Loretto* does not help petitioners.
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> With respect to physical takings, then, this case is not far removed from *FCC v. Florida Power Corp.*, 480 U.S. 245, (1987), in which the respondent had voluntarily leased space on its utility poles to a cable television company for the installation of cables. The Federal Government, exercising its statutory authority to regulate pole attachment agreements, substantially reduced the annual rent. We rejected the respondent's claim that "it is a taking under *Loretto* for a tenant invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79." *Id.*, at 252. We explained that "it is the invitation, not the rent, that makes the difference. The line which separates [this case] from *Loretto* is the unambiguous distinction between a . . . lessee and an interloper with a government license." *Id.*, at 252-253. The distinction is equally unambiguous here. The Escondido rent control

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[13] 503 U.S. 519 (1992).

> ordinance, even considered against the backdrop of California's Mobile Home Residency Law, does not authorize an unwanted physical occupation of petitioners' property. It is a regulation of petitioners' *use* of their property, and thus does not amount to a *per se* taking.

Second, the avoidance canon and *Bell Atlantic* apply only in cases of an unconstitutional taking. As the Supreme Court explained,

> [S]o long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional. *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 194-95 (1985). For precisely the same reason, the possibility that the application of a regulatory program may in some circumstances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred. Under such circumstances, adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty, *cf. Ashwander v. TVA*, 297 U.S. 288, 341-356 (1936) (Brandeis, concurring); it merely frustrates permissible applications of a statute or regulation.[14]

Thus, the court in *Bell Atlantic* recognized that "[o]f course the [Takings] Clause prohibits only uncompensated takings; so long as the Tucker Act provides a subsequent action for redress, generally no constitutional questions arises and the judicial policy of avoiding constitutional questions may not be applied."[15]

In the *Competitive Networks NPRM*, the Commission announced an intent to ensure that property owners receive just compensation for any taking of their property. Even if there is a taking of property, compensation would be afforded to property owners through the Commission action defining nondiscriminatory rates.[16]

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14 Riverside Bayview, 474 U.S. at 459-60.

15 Bell Atlantic, 24 F.3d at 1445.

16 In order to forestall any argument that such rates would not meet constitutional standards of just compensation, the Commission may wish to specify that such constitutional standards would inform the nondiscriminatory rates set by the Commission in future applications. Such a parity of compensation standards would remove any doubts whether the regulation raises any

Finally, to the extent that *Bell Atlantic* was seeking to avoid substantial constitutional questions regarding executive encroachment on Congress' exclusive powers to appropriate funds,[17] the proposed nondiscriminatory access requirement does not at all implicate the Appropriations Clause. That is so because the telecommunications carriers are the ultimate guarantors of any compensation due to property owners. Should a rate be adjudged to be inadequate for any reason, then the Commission would revise the rate to the point of adequacy, and the telecommunications providers would be obligated to pay the revised rate. No liability to the federal government attaches, no claims would be filed, and no appropriations necessary.

In sum, the canon of avoidance and thus the clear statement rule of *Bell Atlantic* do not apply to the proposed nondiscriminatory access requirement because: (1) such requirement may not constitute a taking of property but rather a mere condition on the use of property, (2) any taking would be fully compensated according to constitutional standards, and (3) any such compensation would be made by telecommunications carrier and thus not implicate the governmental fisc nor the congressional authority to appropriate funds. Standard statutory construction techniques reveal that Congress gave the Commission authority to regulate telecommunications access to multi-tenant environments and, in any event, the Commission is accorded *Chevron* deference for its reasonable interpretation of ambiguous statutory grants of agency authority.[18]

Of course, in the final analysis, the Commission's decision in the *OTARD Second Report and Order* does not preclude the Commission from adopting nondiscriminatory access rules in the *Competitive Networks* proceeding. As you are aware, the Commission is not bound by its own precedent, particularly with changed circumstances.[19] It need only provide a reasoned explanation for

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constitutional difficulties (it does not, because of the requirement of full and just compensation); a potentially aggrieved property owner would be able to pursue an as-applied challenge to the adequacy of the compensatory rates in subsequent administrative and judicial proceedings.

17 Bell Atlantic, 24 F.3d at 1445.

18 See FDA v. Brown & Wiliamson Tobacco Corp., 120 S.Ct. 1291 (2000).

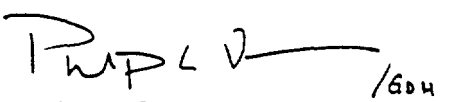
19 See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983)("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.").

changing its policy.[20] The factual differences underlying the OTARD proceeding and the instant one comprise a more than sufficient basis for a difference in the Commission's policy.

The record before the Commission demonstrating the problems confronted by competitive telecommunications carriers reflects a unique and formidable barrier to competitive entry -- one that is distinct from the video programming context. The decision on common and restricted access areas in the *OTARD Second Report and Order* still permits competitive MVPDs into a building insofar as antennas can be placed on tenant balconies. Hence, while competitive facilities-based video programming options may be reduced by the *OTARD Second Report and Order*, a small number of competitors remains viable. By contrast, restrictions on telecommunications carrier access to MTEs can prohibit *all* facilities-based competitive options for telecommunications.

Nevertheless, as the previous discussion indicates, the Commission can adopt nondiscriminatory access rules in the *Competitive Networks* rulemaking in a manner consistent with the analysis used in the *Over-the-Air Reception Devices* rulemaking and controlling legal precedent. Professor Viet Dinh of Georgetown University Law Center has testified before Congress on these matters. We would be happy to arrange for a meeting for you to discuss these issues with him.

Very truly yours,



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20 Id.